No. 15,183

IN THE

United States Court of Appeals

For the Ninth Circuit

HERBERT CAMPOS,

Appellant,

vs.

CARL E. OLSON, also known as CARL "BOBO" OLSON, SID E. FLAHERTY, SID FLAHERTY PROMOTIONAL ENTERPRISES, a corporation, et al.,

Appellees.

REPLY BRIEF OF APPELLEES CARL E. OLSON, ALSO KNOWN AS CARL "BOBO" OLSON; SID E. FLAHERTY; SID FLAHERTY PROMOTIONAL ENTERPRISES, A CORPORATION.

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I.

THE EVIDENCE.

A. The five year agreement of *July 14, 1948,* between Campos and Olson, (Plaintiff's Exhibit No. 2) (R-61), which was approved by the Territorial Boxing Commission of Hawaii, and which was on Commission form, and which expired *July 13, 1953,* provided among other conditions:

Paragraph 1. The manager herewith engages the athlete and the athlete agrees for a period of five years from date of approval by the Territorial Boxing Commission of Hawaii, to render services solely and exclusively for the manager in such boxing contest, exhibitions of boxing, training exercises, *whenever required* by the manager in the Territory of Hawaii and elsewhere the manager may from time to time *direct.* (Italics ours.)

Paragraph 2. The manager agrees that the athlete shall receive 66-2/3 per cent of all sums of money derived by him from *any services that the athlete may render hereunder.*

Paragraph 3. The manager agrees to use his best efforts to secure remunerative boxing contests and exhibitions for the athlete.

Paragraph 6. The athlete shall attend to all training exercises, as the manager shall *require,* and shall proceed and travel by all boats, airplanes, and other means of conveyance as and when *required* by the manager for the purpose of this agreement. (Italics ours.)

B. The document of July 20, 1949, (Plaintiff's Exhibit No. 8) (R-67), which defendants allege is invalid and unenforceable, is a purported contract for 10 years' duration. This document *was never filed with nor approved by* the Territorial Boxing Commission of Hawaii. Pertinent provisions are:

Paragraph 1. That said party of the second part (Olson) for and in consideration of the sum of $1.00 (One Dollar) and other valuable consideration to him in hand paid by said party of the first

part (Campos), the receipt of which is hereby acknowledged, agrees to, and by these presents does hereby, place himself under the management and supervision of first party, and also agrees to, and by these presents, does hereby obligate himself to take part in any and all such *boxing contests, athletic exhibitions, and other contests of physical skill, science and strength, and also to give exhibitions of boxing, training and training exercises, and also to act and perform as a comedian, actor or otherwise in motion pictures, vaudeville and theatrical performances whenever and wherever required* by the said party of the first part (Campos) in such places * * * *, where the party of the first part, his managers, may from time to time *request and direct.* (Italics ours.)

Paragraph 2. It is further understood and agreed, that the said party of the first part hereby engage the sole professional services of the said party of the second part to take in all such boxing contests, vaudeville and theatrical performances and otherwise, to the best of his skill and ability, at such times and places as aforesaid, that may be *required* and *directed* by said party of the first part. (Italics ours.)

Paragraph 4. It is further understood and agreed that said party of the first part shall use his best efforts and endeavors to secure appropriate and remunerative boxing contests, exhibitions, physical contests, motion picture, vaudeville and theatrical performances for the party of the second part during the term of this agreement.

Paragraph 5. It is understood and agreed that the net proceeds of all boxing contests, exhibitions, and contests and performances *herein*

mentioned in this agreement * * * * shall be divided * * * *.

C. The evidence showed that plaintiff Campos had no experience in the "fight" game prior to July 14, 1948, when the five-year contract with Olson was entered into (R-125). Campos was the manager of his brother's dairy farm and a bookkeeper (R-124). This occupation, which was practically full-time, continued during the years through 1951 (R-127). Further, Campos had another sideline during this period, "contracting" for hauling of manure and building homes (R-126-127).

D. The evidence shows that although Olson was a "rated" fighter in 1949 (Defendants' Exhibit B1-B6) by Ring Magazine, that in 1950 and 1951, while Olson was still under Campos' management, Olson *was not rated* by Ring Magazine. (See Ring Magazine and testimony by Mr. Spagnola) (R-356). Mr. Campos, though aware of Olson's 1949 standing, did not, on examination recall Olson's rating in 1950 and 1951 (R-144).

E. The evidence shows that from the date in October, 1950 (R-167-168) of the first Ray Robinson fight in Philadelphia, Olson was required to fight by Campos, and did fight only twice, those bouts being in Honolulu in March and May of 1951 for which Olson received the total sum of $319.78, and for which Campos received $294.30 (R-155-164) (Ptf. Exhibit No. 6).

F. The evidence shows that after the Robinson fight in 1950 (Plaintiff's Exhibits Nos. 29 and 30)

(R-121-127) it was evident, Olson was not in demand as a fighter. He was not considered as having services which were attractive or desirable (R-175).

G. Testimony of Olson (R-224-229, 246), Campos, and of the Commission members (see testimony of all Commissioners) (R-271; R-273, 274, 280; R-297; R-352; R-357; R-368, R-369) of the Territorial Boxing Commission indicate that during 1951 Olson and Campos had disagreements; that Olson complained of lack of fights and lack of money; that he, Olson, was not making a living (R-189). The Commission Minutes of February 1951 (Plaintiff's Exhibit No. 12) (R-72) substantiate this. Too, Campos was concerned (R-179-185) about the money he had "lent" to Olson, an alleged $12,000.00.

H. Campos' testimony was that he lost $5,000.00 in the fight game as Olson's manager through June 1951; and that Olson at that time owed him about $12,000.00 (R-183).

I. In May of 1951 Campos advertised in the Honolulu newspapers to sell Olson's contract. (See testimony of Mr. Spagnola) (R-353-354). Mr. Spagnola offered Mr. Campos $3,000.00 in May of 1951 for Olson's contracts. Mr. Campos rejected the offer stating he wanted $7,500.00. Campos said "No, I want what the boy I think owes me and that's about $7,500.00." (R-353.)

J. The evidence is clear that Olson always performed for Mr. Campos, whenever requested and whenever and wherever required and directed. There

is no evidence to the contrary (testimony Campos and Olson) (R-176-177).

K. The evidence was clear that no remunerative purses for fighting, especially after October 1950, were to be had in Hawaii, because the guarantee to "name" fighters to come to Hawaii was prohibitive (R-172-176).

L. At the informal June 19, 1951 meeting of the Hawaiian Boxing Commission the evidence is as follows:

> *James A. Spagnola* (at R-352 on direct examination):
>
> A. Well, he (Olson) stressed that he was having hardships, no fights, and his family was in distress, and that he would like to go elsewhere and seek fights that would give him some remuneration.
>
> Q. Now what did Mr. Campos say, if anything?
>
> A. Well I believe Mr. Campos didn't say anything, until the Chairman said something.
>
> Q. What did the Chairman say?
>
> A. The Chairman of the Commission then notified Mr. Campos, who was sitting at the end of the table, that would he in any way—would he be willing to let Carl go elsewhere to fight, and Mr. Campos said * * * I believe the Chairman also said, would he stop him in any way from trying to make a living and make money for his family. And at that time, *Mr. Campos, I recollect, said he would NOT stand in Carl's way in any manner, he could go anywhere he wanted to seek employment, and that was it. That's all that was said.* (Italics ours.)

Leon K. Sterling, Jr. (Direct examination by Mr. Clark, deposition page 10) (R-276):

Q. Was anything said at that meeting about Bobo going to the mainland?

A. Yes.

* * * * * * *

A. Yes, exactly who said it, I don't know, but Bobo said if he could go to the coast he could get some fights there. I don't recall exactly who said it. But if Bobo went to the mainland he could get fights there. (R-276).

Q. And do you remember what Campos replied to that?

A. I believe that Mr. Campos said that Bobo could go. (R-276).

A. Well someone said—exactly who said it I don't know, that if Bobo went to the mainland he could get fights and be kept busy, in other words. *It was all right with Campos. And I do believe that Campos said he would get him a trainer up there.* (Italics ours.) (R-277).

(Cross-examination by Mr. Ellis):

A. That subject came up of Bobo leaving *and being able to get fights on the mainland and Campos said that he could go.* (Italics ours.) (R-291).

A. I don't recall the money part of it. *I recall Mr. Campos saying he could go and fight.* But I don't recall the money part of it, the fact that the only reason he wanted to fight was to get the money back. I don't recall that, *But I do distinctly recall that he said he could go and fight outside the territory.* (Italics ours.) (R-294).

Robert M. Lee. (Direct examination by Mr. Clark, deposition, page 93, line 19):

A. At the meeting I referred to, they had discussed this matter of Olson leaving. They wanted to Clarify the thing, whether Campos was going to bring action against Olson at that particular time. *And then Campos said that Olson could go and that he wasn't going to deprive the boy or attempting to deprive him from attempting a livelihood, that the boy could go.* (Italics ours.) In Evidence. (R-400).

Sherman N. Dowsett. (Direct examination by Mr. Ellis, deposition, page 2, line 20):

A. Yes, I have forgotten who spoke up first but the crux of the matter was that Bobo Olson either asked for and got, or was given permission to leave the territory. And some mention was made * * * *the manager didn't wish to stand in the fighter's way as far as being able to make money as a fighter.* (Italics ours.) (R-391).

Mr. Clark. Or better himself.

The Witness. Correct.

A. Well, the only recollection I have of coming up other than the permission to leave the territory was a matter which had been brought up before which was some advances, usual advances on the part of a manager to a fighter, which were evidently owing, that Bobo evidently owed Campos some money. And in order to go away and possibly better himself or make a better living, Olson would be able to eventually, I guess, pay off his debts or advances that had been made to him by his manager. (R-391).

Q. Who made any statement about that. Was that Mr. Campos?

A. Mr. Campos—I don't know exactly how it was put, but there was money owing from fighter to the manager and in giving permission to go he felt that he would be able to recover the advances that he made to the fighter * * *. (R-392).

Q. Were there any limitations placed on Olson by Mr. Campos, as you recall. (R-393).

A. *He said he could go and better himself and to further his fight career.* (Italics ours.) (R-393-394).

Dr. Paul Withington. (Direct examination by Mr. Clark, deposition, page 50, line 4):

A. And at that meeting Olson expressed his desire to go to the mainland, that he wanted to go to the mainland, that he needed to earn money and he could get fights there and he wasn't getting them here. And he was particularly upset because of the cancelling of this Hunter fight on that date. And also at that meeting *Campos said that he did not want to keep the boy from making money and that they had talked it over and he was willing for him to go to the Coast to make money.* (Italics ours.) (R-301).

A. *Yes, that he did not want to stand in the way of the boy making some money.* (Italics ours.) (R-302).

J. Donovan Flint. (Direct examination by Mr. Ellis):

Q. What was said by any one at that meeting in relation to that matter? (R-368).

A. Well, I remember Bobo Olson stating that he was not able to earn a living in the Territory of Hawaii as a boxer and that he was desirous of leaving there for other fields. I remember Mr. Campos stating that *Bobo Olson owed him some money, and then I also remember Mr. Campos stating that he would not stand in the way of Bobo making a living for himself and family,* but that he wanted back the money Bobo owed him from advances and different things, from money borrowed. And that is what I remember about the meeting. (Italics ours.) (R-368-368).

Q. Do you remember any statement by Mr. Campos that Olson might go to the mainland?

A. He stated he did not care where Olson, or Mr. Olson went, as long as he got paid the money he was owed, and he would not stand in the way of Olson making a living (R-369).

A. I remember no discussion, I do remember at the meeting of the 19th, or whatever date it was, that there was no mention made at that meeting of withholding any purses of ⅓ commission. All that Mr. Campos wanted was the money back that he owed him (R-373).

Thomas Miles. (By Mr. Ellis, R-378, 379):

The Witness. Mr. Olson complained to the Commission that day about Campos' relationship with him and asked that the Commission take action to allow him to seek employment in the boxing field in a field other than Honolulu. I am not sure whether Mr. Spagnola interceded for him or whether Carl made this request directly, but one, either Carl or Mr. Spagnola did take it up with the Commission that day, and it was said he wanted to leave and come to California to box.

I think the Chairman, who was sitting on my right, then asked Mr. Campos, who was sitting at the other end of the table, whether or not it was all right for Olson to come away in so far as he wasn't obtaining proper employment in the field of boxing in Hawaii, and Mr. Campos *said that he could go, that he wouldn't stand in the way of Olson earning a livelihood, and that if he could better himself that way, that he certainly would not stand in his way, he would let him go.* (Italics ours.)

Carl Olson. (Direct examination by Mr. Ellis) (R-404):

A. Well, I told the Commission, that I wasn't getting any fights, that I wanted to go to the mainland because I had no money and my family didn't have enough to eat. So they called on Herbert Campos and *Mr. Campos said that he is not stopping me from making a living, I can go anywhere and fight. So I left.* (Italics ours.)

Arthur Stagbar. (Direct examination by Mr. Clark) (R-214):

A. As I recall—I don't know who brought it up—Olson or Campos—but I do recall this specifically that *Campos said he had no objection to Bobo going to the mainland, that everybody is entitled to make a living, and he would permit him to go to the mainland,* but that he would still retain his management rights. (Italics ours.)

A. I know during the course of the conversation that came up that he was willing to let Olson go to the mainland, that he wouldn't *in any way step in to try to stop him, that he would let him go to earn a living.* (Italics ours.) (R-222).

Herbert Campos (on direct examination by Mr. Clark), (R-119) stated that Olson wanted to go to the mainland to fight under Sid Flaherty. Campos stated that Olson could go to the mainland to fight, that Campos would not stand in Olson's way, that Olson could go to the mainland provided Campos retained his contract rights.

On Cross-examination, Campos testified he consented to Olson's going to the mainland to fight. (R-190-191).

M. There is no evidence at all that Campos contacted Olson in any way, shape or manner after June 19, 1951 to provide a trainer, to provide a fight, to require Olson to fight, or to request Olson to fight.

N. There is evidence that commencing in 1951 there was disagreement between Olson and Campos, mainly over proper and remunerative fights. Campos, Olson, and the Records of Minutes of Commission meetings testify to this (see exhibits of Commission meetings and testimony of Commissioners).

O. There is no evidence that Campos provided any radio, vaudeville or other type of theatrical performances.

P. There is no evidence that Campos asserted any rights of management after June 1951.

Q. There is evidence (Defendant's Exhibit D) that Campos and Olson settled their financial problems in Superior Court Action in the City and County of San Francisco, State of California, in 1952. *This judgment was paid* (R-183-187).

R. There is no evidence that under any agreement, Carl Olson was required to reside in Hawaii.

S. There is no evidence that Sid Flaherty had anything to do with or proximately caused Olson to leave Hawaii in June of 1951 (Flaherty R-312-344).

T. The evidence shows that it was not until after Olson had won the American Middleweight Title from Paddy Young in the summer of 1953, and that Olson was scheduled to fight Randy Turpin for the Middleweight Championship of the World in the latter part of 1953, that Campos then first filed an action in the State Courts in 1953, September 11—Plaintiff's Exhibit No. 25.

U. The evidence shows that after July 14, 1953, the Hawaiian Boxing Commission did not recognize Campos as Olson's manager as the 1948 contract had expired (R-383-384). As a matter of fact Sid Flaherty was recognized as Olson's manager by the Hawaiian Commission in 1954 (R-334-335).

V. The evidence shows under Rule 99 of the Commission that the Commission had the authority to review contracts after three years.

W. The evidence shows Campos was never licensed as a boxing manager in the United States, except Pennsylvania, and not in Hawaii after 1953 (R-152-153).

II.

ARGUMENT.

A. THE CONTRACT OF 1948 AND THE ALLEGED 1949 CONTRACT WERE MUTUALLY ABANDONED.

This is obviously a case of an individual, Herbert Campos, who like some others, wanted to get into the mysteries and intrigues of the fight game. He had no experience in the game, when in 1948 he signed Olson to a contract for five years. Later, in 1949 he attempted to sign Olson, and did sign him to what defendant Olson alleges was an invalid ten-year-contract, in Hawaii, never approved by the Commission. Herbert Campos was learning fast.

However, as happens, the fight game did not turn out as anticipated by Herbert Campos. The glamour of the game was lost in the hard reality of the facts. Within three years of the 1948 agreement, Campos had lost considerable money; he was owed considerable money by his protegé Olson, from advances. Under a 1948 contract he had a middleweight who, though once rated in 1949 was not rated in 1950 and 1951, and in 1951 this middleweight was no long a drawing card. Remunerative fights were not available and could not be obtained. The financial outlook and prospects for Campos were bad. It called only for more advances, more expenses for training. This was not a bright prospect for a business man. The future looked bleak. Meanwhile, the boxer Olson was also dissatisfied. He wasn't getting remunerative fights, his family was in dire condition. He was trying to make a living driving a cab and even the auto had been repossessed by the finance company.

Campos, the business man, after the financial failure of the Marshall fight in May of 1951 sought to sell Olson. He advertised in the Honolulu newspapers. A Mr. Spagnola offered $3,000.00, but the business man Campos wanted $7,500.00, which he felt would be closer to salvaging his advances to Olson. There was discouragement from the mainland that Olson wasn't desirable as a fighter.

Both Campos and Olson had made a "bad" deal. It hadn't worked out for either one. This was the background and setting for the June 19, 1951, informal meeting. Incidentally, this was almost three years from the date of the July 14, 1948 contract, within which the Athletic Commission of Hawaii under the power vested in it by Rule 99, in evidence, had the right to review. This was an obvious case to allow the contractees to abandon or rescind their agreement.

It was in this atmosphere that the June 19, 1951 meeting was held with the mutual consent of Olson and Campos. The purport of the meeting, the intent of the parties, the language used, as the evidence shows, is that the parties wanted to get rid of each other. Each was a burden to the other. *The parties, at that meeting abandoned the contract.* The great weight of the evidence, as reviewed supra, is to that *effect.* See the following cases in point on mutual abandonment:

Waldtoufel v. Sailor, 62 C.A.2d 577, 144 P.2d 894;

Treadwell v. Nickel, 194 C. 243; 228 P. 25, at 31, 32;

Gillis v. Gillette, 184 F.2d 872;
Hale v. Campbell, 46 F.Supp. 772;
Atlas Petrol Co. v. Cocklin, 59 F.2d 571;
City of Del Rio v. Ulen Contract Corp., 94 F.2d 701;
McCreary v. Mercury Dr. Distributors, 124 A. 2d 477; 268 P.2d 262;
Griffin v. Beresa, Inc., 143 A.C.A. 339.

In effect plaintiff effectively repudiated the agreement, and Olson relying on the statements of Campos thereafter changed his position by going to the mainland, bringing his family there, by engaging a manager, a trainer, and undergoing expense. This was all something Campos knew must necessarily occur, and his continued action after the meeting (to be discussed) did not set aside his estoppel. See *Nemarich v. Christenson,* 87 C.A.2d 844; 197 P.2d 785.

The meaning of the contract, or oral abandonment, is to be determined from the acts of the parties. The effect and meaning of the words will be given by this conduct.

In *Mitau v. Roddan,* 149 Cal. 1; 84 P. 145, at page 150, the Court said:

> "Parties to a contract have a right to place such an interpretation upon its terms as they see fit even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. And in all cases where the terms of the contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the Courts will follow the

practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to its own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention; than they are when subsequent differences have impelled them to resort to the law, and one of them seeks a construction at variance with the practical construction they have placed on it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation, which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulties."

See *Griffin v. Beresa, Inc.* (supra), 143 A.C.A. 339.

In the case at bar, after the June 19, 1951 meeting at which this new oral agreement took place, the parties acted upon it and executed it. Olson went to the mainland as indicated. He secured the services of a manager, Sid Flaherty, and under his direction,

became the Middleweight Champion of the World. Campos, after the meeting never asserted any so-called managerial *rights directly to Olson.* He never provided a trainer for Olson. He never required Olson to fight. He never requested Olson to fight. In 1952, he brought suit for moneys allegedly due for advances, which was settled and which was paid. It was not until September 1953, more than 2 years after the June 19, 1951 meeting that Campos, seeing that Olson was American Champion and on his way to the "big" money, asserts a claim or right in the State Courts of California. The actions and the conduct of both parties definitely prove an abandonment was intended to and did take place on June 19, 1951. Actually Campos wanted to get "rid" of Olson. It was a bad deal. He wanted to relieve himself of his managerial burdens, and the necessity for further advances. The evidence all supports this conclusion.

B. THE EVIDENCE SHOWS NO BREACH OF THE 1948 CONTRACT AND THE ALLEGED 1949 CONTRACT.

In any event, though, the great weight of the evidence proves the parties abandoned the contracts alleged, it is apparent that Olson committed *no* breach of the alleged agreements under any of the evidence.

We start with so-called "exclusive" contracts between Olson and Campos. The key as to what happened lies in the meeting of June 19, 1951 before the Hawaiian Commissioners.

There can be no doubt from all the evidence as restated supra that Mr. Campos *consented* to Olson's leaving Hawaii to go to the mainland to fight, and that Mr. Campos would not stand in Olson's way. This can mean only one thing. It was obvious that Olson, in order to fight, would necessarily have to *leave,* would necessarily have to license himself in the mainland, would necessarily have to *secure trainers,* would necessarily have to secure a *manager,* and would necessarily have to undertake all action to foster and promote his boxing career. There can be no breach of contract under these conditions.

It is a maxim of the law, that he who consents to an act is not wronged by it.

California Civil Code, Sec. 3515;
Hill v. Berry, 79 C.A.2d 771;
Estate of La Belle, 93 C.A.2d 358; 208 P.2d 432.

Further, after having consented to the act, and not being wronged, the promisor cannot change his purpose to the injury of another. *California Civil Code,* Section 3512.

Thus it is clear that by intent of the parties the so-called "exclusive" contracts could no longer be exclusive, by the very nature of the fact of consent.

It necessarily followed that Olson would enter into a relationship with another manager, which he did. We are not, in this action, concerned with that relationship, but only the rights as between Olson and Campos. For after June 1951 Campos never required Olson to perform under the 1948 agreement, nor under

the alleged 1949 agreement. There is no evidence that Olson would not have performed. The fact that Olson had an arrangement with Flaherty under a contract dated September 1949 is of no significance. The validity or invalidity of the Olson-Flaherty arrangement is not before the Court, although plaintiff argues strongly that in October 1950 Flaherty released Olson from that arrangement. (See Plaintiff's Exhibit No. 10.) In any event Olson, the subject matter of the contract between Campos and Olson, was in existence, capable of performing. The fact that he fought on the mainland was in accord with Campos' statement of June 19, 1951. Thus, strict performance of a contract may be waived.

Pasquel v. Owen, 186 F.2d 263;
Williston Contracts, Vol. 3, Revised Edits., Sec. 1969, et seq.

Further when the party acts on the words and conduct of another, and changes his position in reliance thereon, that other person may not change his assurance he has given another. An estoppel arises.

American Nat. Bank v. Sommerville, Inc., 191 C. 364, at 373; 216 P. 376;
Davenport v. Stratton, 24 C.2d 232, 149 P.2d 4;
Altman v. McCollum, 107 C.A.2d Supp. 847;
Shore v. Crain, 50 C.A.2d 736.

And, as a matter of fact, the facts show that Campos never objected to Olson fighting for Flaherty—*never to Olson.* He only, in 1952, demanded the money advanced to Olson, which was settled and paid. In 1953, Campos sued in the State Courts of California for a

one-third share of purses. Never did he require Olson to perform—never did he—to Olson—repudiate the consent given to fight, nor could he, as he would have been estopped. Not having performed himself, Campos is entitled to nothing.

To enforce the 1948 contract and/or the alleged 1949 agreement would be to allow plaintiff to receive substantial sums of money, without having rendered to or without having attempted to render to defendant Olson any performance, service or consideration. This was the case from June 1951 to date, especially so since Campos in 1952 received his just dues by way of settlement of his money claims.

A Court sitting in equity, will not enforce an agreement which thus would be harsh, oppressive, unfair and inequitable. Equity must be done by plaintiff and plaintiff must have contributed something to defendant (*Jacklich v. Baer,* 57 C.A. 2d 684).

Plaintiff failed to perform before and after June 19, 1951, the evidence shows. But limiting this argument to the time after June 1951, plaintiff's failure to perform precludes him from recovery. He could not just sit back and do nothing.

As *Williston* in Section 1015, page 2794, on Contracts points out, this type of contract is basically for the employee or fighter where work will increase his skill, connections and reputation. The employer (manager) is duty bound to furnish that work. This Campos never did.

It is a strange conclusion reached by plaintiff in his brief that Olson breached his contract. The whole

argument of plaintiff is predicated on an *assumption of a breach,* and his cases all go to discussing law, which assumes a breach. The answer to this is simply, that Olson, under the 1948 agreement and 1949 alleged agreement, had to do nothing *unless required* and after June 1951 Campos *did not require* Olson to do anything.

There was a duty, a burden on Campos to get Olson fights, to provide trainers, to handle and manage his boxing career, which Campos did not do, and was happy and relieved not to do. Thus, the question argued at length by plaintiff that Olson prevented performance and excused plaintiff is not valid. Olson prevented nothing. Olson did nothing but act in accord with the consent Campos had given him, and which both he and Campos understood as evidenced by their later conduct and relations to each other.

See *Mitau v. Roddan,* supra.

C. CASES CITED BY PLAINTIFF ARE NOT IN POINT.

There is no evidence that Olson would not have fought for Campos if required. There is evidence by Campos to the effect that he procured no fights for Olson subsequent to May 1951.

Ross v. Tabor, 53 C.A. 605, is not in point for there the Court had found that defendant had abandoned the contract, under conditions where defendant just left and disappeared. *There was no meeting between the parties, no discussion, no consent, no modification prior to that as in our case.* We do not quarrel with

general principles of law, but we do insist that the law be applicable to the facts. The case arose on nonsuit and only states the law to be that *if defendant had abandoned his contract,* plaintiff need not further perform. *This is not our case.* Olson's obligation to perform depended on Campos' requirement. This is a peculiarly singular type of contract. It was a *condition precedent on the part of Campos* to require Olson to perform.

This case, along with others cited by appellant, is not in point for the reasons expressed.

See *De La Falaise v. Gaumont British Pict. Corp.,* 39 C.A.2d 461, at 468, where it is held it is well recognized that failure to comply with the condition precedent (there notice to engage in a movie) will prevent an action by the defaulting party to enforce the contract.

D. THE DOCTRINE OF ANTICIPATORY BREACH IS NOT APPLICABLE.

In support of plaintiff's position, a letter dated June 31, 1951, signed by Olson *directed and addressed to the Territorial Boxing Commission of Hawaii* (Plaintiff's Exhibit No. 35), and delivered to the Commission June 14, 1951, is relied on. This is *five days* before the *June 19, 1951 key meeting.*

There is no evidence in the record that Campos knew about this letter prior to the June 19, 1951 meeting, or at that time. It was not addressed or delivered to him. Obviously this letter was found in

the Commission files long after the meeting of June 19, 1951, and in anticipation of this lawsuit when the files were searched. The letter was not brought up or discussed at the June 19, 1951 meeting.

The law is clear. In *Patty v. Berryman,* 95 C.A.2d 159; 212 P.2d 937, at page 170, the Court said:

> "Moreover the conversation was with Huston, not Patty (the Plaintiff). Just how a conversation with Huston, with whom Berryman (the defendant) had no contractual relations, could constitute an anticipatory breach of the contract between Berryman and Patty does not appear. Section 318 of the Restatement of Contracts, in illustration No. 3 gives the following example: A and B enter into a bilateral contract to sell and buy goods during the following month. Before the time for performance arrives, A tell C, *a third person having no right under the contract,* that he intends not to carry out his contract with B. C informs B of this conversation though not requested so to do by A. A *has not* committed an anticipatory breach." (Italics ours.)

This is the case at bar, even assuming such a repudiation took place by Olson, which it did not.

It is the law that the alleged renunciation of a contract by a promisor before the time stipulated for performance is not effective unless such repudiation is unequivocally accepted by the promisee (*Robinson v. Raquet,* 36 P.2d 821; 1 C.A.2d 533).

In our case there was no communication to Campos, and no acceptance, which there obviously could not be. As a matter of fact, Campos on June 19, 1951 by

his own testimony was insisting on his contract rights. Further an alleged renunciation may be withdrawn before acceptance (*Bu-Vi-Bar Petrol Corp. v. Krow,* 49 F.2d 488).

Obviously, the parties here, Olson and Campos, requested a meeting of the Commission to "iron out" their rights. This was held on June 19, 1951, especially at Olson's insistence, as the record shows. The intent of the parties is thus clear. The meeting of June 19, 1951 supersedes any previous uncommunicated (to Campos) statements from Olson. It was there that the parties made statements which the trial Court construed as determining the rights of the parties.

Further, any alleged renunciation must be absolute and unequivocal. A mere expression of intention is not enough (*Atkinson v. District Bond Co.,* 43 P.2d 867; *Wilton v. Clarke,* 80 P.2d 141, 142).

In analyzing the letter (Plaintiff's Exhibit No. 35), Olson writes the Commission expressing dissatisfaction with Campos. He asks the Commission to investigate Campos' actions looking to a hearing by the Commission. Olson states he intends to carry out the Hunter contract and perform, looking to the Commission as to his rights. He qualifies his unavailability for further matches in the Territory by giving notice.

Under no practical construction can this be a clear, unequivocal renunciation. But this is unimportant because, as indicated, *Patty v. Berryman,* supra, is decisive of the point raised. There was no communi-

cation to Campos by Olson. Further the intent of both parties was to clear the atmosphere on June 19, 1951 at the Commission meeting. At that time, both Olson and Campos recognized rights and obligations under the 1948 agreement. A solicitation of the aid of the Commission was sought. This is reflective of the true intent of Olson and Campos.

Further there was no performance due by Olson to renounce and none was requested by Campos.

One cannot renounce what does not exist. Thus the cases cited by appellant are not in point on the facts.

E. NO WRONGFUL INDUCEMENT OF BREACH OF ALLEGED CONTRACT BY DEFENDANT FLAHERTY.

To establish plaintiff's second cause of action, the evidence on behalf of plaintiff must show that the contract which would have otherwise been performed, was breached and abandoned by defendant Olson, by reason of the wrongful act of Flaherty, and that such act of Flaherty was the moving cause, and unless the act complained of is the proximate cause there is no liability.

Hill v. Progress Co., 79 C.A.2d 771, at page 780; 180 P.2d 956;

See also *Johnson v. Union Fur Co.,* 31 C.A.2d 234; 87 P.2d 917;

See also *Augustine v. Trucco,* 124 C.A.2d 229; 268 P.2d 780.

It is necessary to prove that defendant intentionally and actively induced a breach of contract (*Augustine v. Trucco,* supra) (*Speegle v. Board of Fire Underwriters,* 29 Cal.2d 34; 172 P.2d 867).

Augustine v. Trucco, supra, lays down the necessary elements to be pleaded and proved under plaintiff's second cause of action.

1. The existence of a valid, legal contract between A and B.

2. The alleged wrongdoer's, C, knowledge of the existence there of a valid contract between A and B.

3. C's intentional and *active inducing* of a breach thereof without justification.

4. Proximate Cause (citing *Hill v. Progress Co.,* supra).

5. Damages.

Further under the doctrine of *Case v. Kadota Fig Assn.,* 35 Cal.2d 596 (at 605); 220 P.2d 912, there must be a breach of contract, for if no breach occurred, no wrong can be charged to one said to have wrongfully induced the breach.

The action is one based on tort (*Elsbach v. Mulligan,* 58 C.A.2d 354; 136 P.2d 651).

It is obvious that there is no evidence whatsoever, except by far-fetched conjecture, that defendant Flaherty in any way interfered with any contractual relationship which existed between plaintiff Campos and defendant Olson.

F. IN ANY EVENT, ANY ALLEGED INTERFERENCE BY DEFENDANT FLAHERTY WITH ANY CONTRACTUAL RELATIONSHIP BETWEEN PLAINTIFF CAMPOS AND OLSON WOULD BE BARRED BY STATUTE OF LIMITATIONS. THIS DEFENSE IS RAISED BY ANSWER.

Plaintiff's second cause of action against defendant Flaherty is one based on the theory of the wrongful conduct of defendant Flaherty in allegedly inducing Olson to breach the alleged agreements with plaintiff.

The law is well settled that this course of action is one in tort (*Elsbach v. Mulligan,* 58 C.A.2d 354, 136 P.2d 651).

The applicable *California Civil Code of Procedure* sections are 339(1), which prescribes a 2-year statute of limitations for "an action upon a contract obligation *or liability* not founded upon an instrument in writing. . . ."

It has been held in *Lowe v. Ozmun,* 70 P. 87 (Cal.) (1902), that the term "liability" as used in Section (339(1) of the Code of Civil Procedure includes *responsibility* for *torts* and is applicable to *all* actions at law, not specifically mentioned in the statutes.

Further Section 340(3) of the *California Code of Civil Procedure* sets up a one-year period of limitation for . . . an action for . . . injury to . . . one caused by the wrongful act . . . of another.

A legally protected interest or property right which is invaded is caused "injury" within the Statutes of Limitations applicable to injury to persons (*Luellen v. City of Aberdeen,* 148 P.2d 849; 20 Wash.2d 594).

The tort of interference with a contractual relationship, or the inducement of a breach of a contractual relationship, is *not a continuing* tort. See *Hagan Corp. v. Medical Society of New York County,* 96 N.Y.S.2d 286 (1950).

That the Statute of Limitations commences to run from the *alleged* breach of contract by Olson, to wit, June 27, 1951, and is a two-year period. (See *Lowe v. Ozman,* 137 Cal. 257, 70 Pac. 87; *Lattin v. Gillette,* 95 Cal. 317; *California Code of Civil Procedure,* Section 339(1).)

The case of *Romano v. Wilbur Ellis Co.,* 82 C.A.2d 670, 186 P.2d 1012, cited by Plaintiff's Brief, merely holds that where defendants are *charged by pleading with appropriate allegations of fraud and false representation* which are alleged to have induced a breach of a contractual relationship, a three-year-statute of limitations is involved.

However, our present case *is not* one in which either *fraud is pleaded or proved,* nor any reliance on any alleged misrepresentations or right to rely.

The Restatement of Torts, Section 766, at page 51, develops the historical background of this type of action. The gist of that section is that there may be *non-tortious methods* of inducement of alleged breaches of contract. *Fraud is no factor.* Therefore, Section 339(1) Code of Civil Procedure creating a two-year period of limitation would be applicable. This defense was raised by the pleadings.

G. IT IS FURTHER TRUE THAT THE APPELLATE COURT SHOULD NOT DISTURB THE TRIAL COURT'S DECISION ON A FINDING UNLESS IT IS CLEARLY ERRONEOUS.

In this case, the trial Court heard and saw the plaintiff Herbert Campos, the defendants Carl Olson and Sidney Flaherty, and also James A. Spagnola, Thomas Miles and J. Donovan Flint, all of whom, except Flaherty, attended the June 19, 1951 Commission meeting. Flint was a commissioner at the time. Their testimony and appearance adequately gave the trial Court a true picture of the events at Honolulu on June 19, 1951, from which the trial Court drew its conclusions, *and it can hardly* be *stated* that, with that testimony before the Court, that the findings are clearly erroneous. The evidence clearly supports the findings.

H. SUMMARY.

It is submitted that it is apparent that the case at bar is simply one of an individual, Mr. Campos, who has given nothing to another, Mr. Olson, and who was repaid any legitimate obligation, seeking to impose a 10-year servitude upon Olson based upon what defendants allege is, in any event, an invalid, unenforceable 10-year agreement. There is no evidence that Olson breached any agreement, or that Flaherty induced any alleged breach of an agreement. The evidence simply indicates a consent by Campos for Olson to do exactly what Olson did. On no theory of equity should Campos recover; his own actions estop him. The intent of Campos and Olson on June 19, 1951 is

determined from their conduct between themselves thereafter. There is no basis in fact or in law for Campos to be awarded relief. The pertinent question asked by the trial Court, to wit, wherein did Olson breach the alleged contracts, is still unanswered.

It is respectfully submitted that the judgment of the District Court should be sustained.

Dated, San Francisco, California,
December 10, 1956.

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